Episode 48

Judgement on Family Laws

I have written before that among the laws that the Constitution had declared to be out of the jurisdiction of the Federal Shariat Court was the "Muslim Personal Law" (i.e. the personal laws of Muslims related to marriage, divorce, inheritance, etc.). This was commonly understood to mean that the "Muslim Family Laws Ordinance" that had been enacted during the rule of the late General Muhammad Ayyub Khan (and which is commonly known as "*ʿĀilī Qawānīn*" and had been strongly opposed by the noble scholars) was also out of our jurisdiction, i.e. that we could not annul any article of that law on the basis of it being contrary to the Quran and Sunnah. Prior to our appointment to the Federal Shariat Court, a bench of the Supreme Court had also issued a judgement in a case in which it declared these Family Laws to be out of our jurisdiction. This case is famously known as the *Musammāt* Farishta case.

However, from the very beginning I did not agree with this interpretation. I believed that the exception of the "Muslim Personal Law" from the jurisdiction of the Federal Shariat Court did not mean that any verdict issued by the government related to marriage, divorce, etc. could not be declared by the Federal Shariat Court or the Shariat Bench of the Supreme Court as being contrary to the Quran and Sunnah, rather the goal of this exception was to protect the personal laws of the various schools of thought, such as Sunni, Shia, etc. However, since a three-member bench of the Supreme Court had already delivered its judgement according to that interpretation in the *Musammāt* Farishta case, the judges had formed a general notion that this matter is settled and that there is no need to re-open it for discussion.

Nevertheless, I believed that this matter could be reviewed when the Shariat Bench consisted of five members. In relation to this, when some articles of the "Zakat Ordinance" were challenged before us, the government's lawyer took the stance that this Ordinance was out of our jurisdiction. Firstly, on account of it being a "Fiscal Law", and secondly, due to it being a part of "Muslim Personal Law". He also cited the precedent of the *Musammāt* Farishta case, in which it was declared that any law that applies to Muslims only is part of "Muslim Personal Law".

In my judgement of this case, I acknowledge it to be a “Fiscal Law”. However, regarding it being a “Muslim Personal Law”, I only wrote: “Since the Zakat Ordinance is out of this court’s jurisdiction due to it being a “Fiscal Law”, there is no need to discuss whether it falls under the definition of “Muslim Personal Law” or not.” With this sentence, I gave a signal that there was scope to review the *Musammāt* Farishta case.

After some time, another case was presented before us in which, in view of the *Musammāt* Farishta case, it appeared that the law under discussion fell within the definition of “Muslim Personal Law”. At that time, our Bench consisted of five members and was headed by Justice Abdul Qadeer Chaudhary. At this point, the lawyer representing the government cited the *Musammāt* Farishta case in defence. At that, I said: “The definition of “Muslim Personal Law” in the *Musammāt* Farishta case needs to be reviewed”. At this, he said: “That judgement has already been issued. It cannot be re-opened”. I said: “No, that verdict was issued by three judges while currently the Bench has five judges and can review it”. Justice Chaudhary supported this, but said: “We can certainly review it, but what is the flaw in that verdict?” At this, I presented: “The intention of the Constitution is not that any laws created regarding marriage, divorce, etc. should be impossible to review as to whether they conform to the Quran and Sunnah or not. Instead, the real reason is that it has been stated in article 227 of the Constitution that with regards to the personal laws of the various schools of thought, only that interpretation of the Quran and Sunnah will be considered which the adherents of that school of thought consider to be correct. For example, if, in the issues related to marriage and divorce, the followers of the Hanafi, Shafi, Maliki, Hanbali or Ahl al-Hadith or Shia school of thought have their own stance, their stance cannot be declared to be contrary to the Quran and Sunnah and thus annulled. However, if a law is not specific to any of these schools of thought and it is implemented on all of them, then there is no prohibition on reviewing it in the light of the Quran and Sunnah”.

Some lawyers of the case backed this point of mine, and Justice Saeed-uz-Zaman Siddiqui also presented arguments in support of it. Eventually, in a unanimous decision of all five judges of the Bench, the definition of “Muslim Personal Law” stated in the *Musammāt* Farishta case was

discarded. This judgement was penned by Justice Saeed-uz-Zaman Siddiqui and was published in the PLD.

Until now, it had been assumed that the "Family Laws" implemented by the late General Ayyub Khan were protected by the Constitution, and that the Federal Shariat Court or the Supreme Court's Shariat Appellate Bench could not abolish them if they were proven to be contrary to the commandments of the Quran and Sunnah. In the wake of this verdict, this assumption was proved to be incorrect, and a path was opened to challenge those laws as well. However, it is regrettable that no religious group filed any petition against those Family Laws. While some other individuals did file a petition against the Family Laws in the Federal Shariat Court, no one from the religious groups followed up on that petition. That case continued for quite some time and its judgement was also issued. An appeal to that judgement came to us in the Shariat Appellate Bench of the Supreme Court, but I had parted from the Supreme Court before its hearing.

In the meantime, after the martyrdom of the late President Muhammad Zia-ul-Haq, the People's Party came to power under the leadership of the late respected Benazir Bhutto. During their rule as well, I continued working as usual for some time, but one day I suddenly received news that the government had dismissed me from the Bench. I thus remained away from the Supreme Court for some duration. However, later Mr Farooq Leghari, in his capacity as President of the country, dismissed the government of respected Benazir Bhutto. During that time, one day I received a phone call from Mr Leghari, informing that I had been reinstated in the Supreme Court. I had nothing to do with politics; I was only interested in the work, so I resumed working in the Supreme Court.

"Fiscal Laws" had been kept out of the jurisdiction of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court for ten years. The apparent reason for this was that in order to rid the banking system of interest, President Muhammad Zia-ul-Haq had instructed the Council of Islamic Ideology to present an alternative system, which was under preparation. When the Constitution was amended to allow for any law to be challenged in the Federal Shariat Court, there was a concern that if banking laws were annulled through the Federal Shariat Court before the alternative banking system could be implemented, it could lead to voids in the law. Therefore,

fiscal laws were granted protection for ten years. Regrettably, there was no one to follow up on this ten-year period after the demise of President Zia-ul-Haq. It had been granted to implement an alternative system in the Constitution, but later governments not only paid no attention to it, rather took up all steps in the opposite direction, and in this manner this ten-year period eventually elapsed.

When ten years passed, fiscal laws also came under the jurisdiction of the Federal Shariat Court. In the wake of this, several common Muslims challenged those laws that legalized commercial interest and filed petitions against them in the Federal Shariat Court. Dr Tanzil ur Rehman was the Chief Justice of the Federal Shariat Court at that time. In his detailed judgement dated 14-11-1991, he declared all forms of commercial interest to be against the Quran and Sunnah and declared the relevant laws to be null and void from an appointed date.

However, United Bank Limited filed an appeal against this judgement in our Shariat Appellate Bench of the Supreme Court. Since it was generally deemed very difficult to eradicate interest from banks and government dealings, and it was also thought (we seek Allah's refuge) that this could negatively impact the economy, the respected judges of the Supreme Court continued deferring the hearing of this appeal. On my side, I would ask the Chief Justice of the time, Justice Afzal Zullah: "It would be unjust to intentionally put off this appeal". On one occasion, he said to me: "We can now set that appeal for hearing any time", and for this, he held me in Islamabad for a month. However, for some reason he changed his mind and the appeal was not set for hearing. Another reason for this delay was that there was no one asking for an earlier hearing of these appeals from outside. I have stated earlier that religious circles never at all heeded the importance of this Court or considered making use of it. Consequently, no one had any concerns whatsoever if those appeals continued to dwell in the cold storage.

It was perhaps seven years that those appeals remained in the cold storage. Three Chief Justices had been changed during this time. Finally, when Justice Ajmal Mian became the Chief Justice, he said: "Let us first hear all the criminal appeals that are awaiting a hearing. Thereafter we shall set those appeals for hearing". Subsequently, when all criminal appeals were heard, he finally

formed a bench to hear those appeals. This bench comprised of, besides myself, Justice Khalil-ur-Rehman, Justice Munir A. Shaykh, Justice Wajihuddin and Justice Mahmood Ahmed Ghazi.

The hearing of this appeal continued for several months, and we invited several *ʿulamā* (scholars), experts of economy, bankers and other intellectuals to the court on behalf of the Court. They registered detailed statements. The lawyer who had been appointed to represent the government, respected Syed Riaz-ul-Hassan Gilani, requested for more time several times, which was granted, and finally began presenting his arguments. However, after some time, he filed an appeal to defer the hearing of this case by several months. He had been granted sufficient time and opportunities to present his point of view in detail, but what was heard is that he had some disagreement with the government over his contract which could not be resolved, so he asked for a prolonged extension of the case, which was unacceptable in the eyes of the Court. Additionally, he had already presented the basic framework of his arguments. Therefore, the Court continued the hearing instead of deferring it, and after hearing the case for several months, reserved its judgement. On this occasion, Justice Khalil-ur-Rehman wrote the longest verdict, which was perhaps six hundred pages long. A second verdict was written by me, which comprised of about two hundred and fifty pages. In this, all the arguments presented in support of the permissibility of commercial interest were rebutted, including the arguments presented by Riaz-ul-Hassan Gilani. Also, the impression that interest is a vital part of the system of economy was rebutted from a Shariah as well as academic point of view, as well as based on experience. Besides PLD, this verdict of mine was also published under the title “The Historic Judgement on Interest”, which was originally published in English and afterwards translated into Urdu by my son Maulana Dr Imran. Justice Wajihuddin also wrote a judgement, in which interest-related laws had been declared to be un-Islamic.

It is a court process that if multiple judges write their own judgements, after issuing all the verdicts, the Court issues a Court Order which the government is obliged to comply with. This Court Order is usually brief, but in view of the significance of this issue, it was decided to draft this order in more detail. On behalf of the bench, I was appointed to write the order. I therefore wrote the draft of this Court Order, and finally in the blessed month of Ramadan, on the 23rd of

December 1999, just before the beginning of the new millennium, this historic judgement was announced in Lahore. It consisted of about 1100 pages and was perhaps the longest verdict in the history of the Supreme Court, and was very warmly received by numerous circles. Mr Arshad Ahmad Haqqani, who was a prominent columnist for Jang newspaper and was inclined towards the modernists on many matters, wrote a column titled “A History-making Judgement”. In it, he not only backed this judgement from a theoretical as well as practical point of view, but also called it a very good omen.

In this verdict, we had granted the government one year to abolish the laws legalizing interest and to implement an alternative interest-free system, and had also outlined the steps that would be necessary to accomplish this in this time period.

When this verdict was issued, the Governor of the State Bank of Pakistan, Mr Ishrat Husain, visited me and asked: “Is an extension to this one-year duration possible?” I said: “If the government immediately begins taking serious steps in compliance with the verdict, firstly the extension may not be needed. And if the government asks for an extension, according to court procedures, it would have to present an account of each and every day, as to what was done on that day. Thereafter if the Court feels that the government has made sincere and hard efforts to accomplish the goal, and in spite of this, is facing impediments which would require more time, then it is possible to consider the request for extension. However, if the government does not do anything the entire year and thereafter presents a request for extension, then it would be deemed a mere excuse for inaction”.

During this time, a bank filed a request to review this judgement. A request for review in the Supreme Court is not the same as an appeal, rather there are conditions for this request to be entertained. Firstly, as far as possible, the same bench should hear the arguments for reviewing the verdict that issued the verdict in the first place. Secondly, the request should point out some evident mistake in the judgement. It is not intended from this review that the entire case should be heard from the beginning. Also, the same argument cannot be presented that had already been discussed in the judgement.

Coincidentally, when we announced the judgement on interest, the government of General Pervez Musharraf had only recently come to power through Martial Law. In some gatherings, he stated: “this judgement is a conspiracy to prove my government a failure”. Thereafter the application to review it was once again put in the cold storage. In the meanwhile, the respected General suspended the Constitution and issued the PCO (Provisional Constitution Order), in which several articles of the Constitution of the country were suspended, and the judges were invited to take oath according to the PCO. Consequently, the Chief Justice of the time Saeed-uz-Zaman Siddiqui, Justice Khalil-ur- Rehman and Justice Wajihuddin refused to take oath under the PCO, and became retired as a result. Justice Munir A. Shaykh took the oath. I plunged into a dilemma at this juncture. At that time, I thought: “I have taken oath based on the original Constitution. If I now take oath based on the PCO, I would be contravening my previous oath”. I therefore abstained from taking oath for several months. By that time, Mr Irshad Hasan had become the Chief Justice. He repeatedly urged me to take the oath. The late Dr Mahmood Ahmad Ghazi had become the Minister of Religious Affairs by that time, and Mr Irshad Hasan related his words to me, that he was requesting me to take the new oath. While my opinion could not be swayed by those requests, after pondering over this matter for a long time as well as performing *istikhārā* and seeking counsel, I felt that the matter of the judges of the Shariat Appellate Bench was different compared to other judges. This is because both the oaths were taken to protect the Constitution. The situation of the scholar judges of the Shariat Appellate Bench was that they had not been made protectors of the entire Constitution, rather a part of it. If someone contravened other articles of the Constitution, the Shariat Appellate Bench would not even have jurisdiction to hear a case against it. However, the one chapter of the Constitution that had been assigned to it to protect was completely unchanged in the PCO as well. Therefore, taking oath under the PCO would not be incompatible with the first oath, rather it would be equivalent to affirming and corroborating it. At the same time, if I decided to refuse to take oath like others and parted from the Court, the entire bench for reviewing the judgement on interest would become dismantled. For these reasons, I eventually took oath and resumed work a third time.

When a year was about to elapse since the judgement on interest was issued and the timeframe granted to the government to abolish the relevant laws was nearing an end, it filed an application

for an extension. At that time, the other scholar judge in the Shariat Appellate Bench, Justice Mahmood Ghazi (may Allah have mercy on him), had left the Bench due to being appointed the Minister of Religious Affairs, and there was no one in the Bench on the quota for scholars except myself. Additionally, Chief Justice Irshad had formed such a bench whose other members were not much familiar with this issue. Normally, the principle is that if the Court sets any timeframe for some law and the government requests an extension, it is asked as to what steps it took in following the orders of the Court during the given timeframe, and what further steps need more time. However, Justice Riaz, who was the senior-most member of the Bench at that time, did not deem it necessary to ask these questions of the Attorney General. When I asked these questions to the Attorney General, he replied: “The government has formed a commission headed by the Governor of the State Bank that is continuously working on this”. At this, I showed him the relevant part of the Court Order and said: “It is specifically stated that this commission should have authority in implementing an alternative system to the interest-based system, and that it should oversee the entire process. However, the commission actually formed can merely formulate recommendations. Such recommendations have previously been compiled as well. What is the new action that the government has taken during this one year?” At this, the Attorney General reiterated the same oft-repeated reply: “This is such a huge work that cannot be accomplished overnight.” I said: “We have been hearing this for the past sixty years. Change of any system does indeed require time, but this can only be reasonably said when a clear planning and timeframe is defined for this work. Otherwise, every matter can be left hanging like this for centuries”. Since the general inclination of the Bench was in favour of granting more time to the government, at this point I said to Mr Riaz: “While granting them more time, we should make it incumbent upon them to present a plan of action for this year, with detailed milestones, which should follow the mode of action specified in the previous Court Order”. However, it felt like he was in such a hurry to wrap up this request that he did not even deem it necessary to have any lengthy conversation regarding it. Therefore, he eventually accepted their request and the government received one more year. Initially, I had thought of writing a dissenting note on this decision, but the respected Chief Justice had previously said: “We shall soon complete the Shariat Appellate Bench and set the original review request for hearing”. I thought that the original issue

would come under discussion during that hearing and I would thus be able to present my view in more detail at that time. Also, even if I wrote a dissenting note at this time, there would be no practical benefit obtained from it. Therefore, other members of this bench had requested me not to write any special note to this decision. I thus did not write any dissenting note, but later I regretted this and felt that I had made a mistake. I could at least have expressed my view clearly in that note, which, while it would not have had any practical benefit, at least the record could have been set straight. ما شاء الله كان وما لم يشأ لم يكن

But what transpired soon after this incident is that when the time came for the review request of the judgement on interest to be set for hearing, General Pervez Musharraf terminated my appointment in the Shariat Appellate Bench and appointed Dr Rashid Jalandhari in the scholar's quota, along with Allamah Khalid Mahmood, who was residing in Britain at the time and was called to Pakistan and made a judge. On this occasion, in complete contrast to the normal procedures of higher courts, scholars were interviewed for appointment as judges. And Maulana Mufti Munib-ur-Rahman told me that during his interview, he was asked: "What is your stance on "*riba*" (interest)? Do you consider bank interest to be impermissible?" He gave a reply along the lines: "How can I declare something to be permissible that the Noble Quran has declared to be impermissible? However, with regards to what steps should be taken to rid the country of this, and how much time would be needed for it, this can be thought over". After the interview, he was not appointed as a judge.

This new bench was formed in this manner and it was made to review our judgement on interest, and it unanimously dismissed our judgement and sent the case back to the Federal Shariat Court. Consequently, the case went back to square one and was once again put in the cold storage. From then until now (4th of March 2016)[1], the case is still at the same stage. In the wake of our parting from the Supreme Court, the Federal Shariat Court and the Shariat Appellate Bench of

[1] And today, on the 15th of October 2021, the situation is the same, rather the government's lawyer has said to the Federal Shariat Court, which has already become lifeless, that it does not have jurisdiction to hear any case on this topic. The game of continuously deferring this case is thus still being played.

the Supreme Court are virtually suspended. According to the Constitution, the Federal Shariat Court should contain three scholar judges, but it has been years upon years that only Dr Fida Muhammad (may Allah have mercy on him) was included in it on the quota of scholar judges, while the remaining two judges have not been appointed since years. Now after his demise, the Court comprises of only three judges, which apparently does not include any formal scholar. There is no one to even protest against this blatant contravention of the Constitution. A few hard-headed individuals are still pursuing this case, but no effective voice raises for this purpose. According to the Constitution, the Shariat Appellate Bench of the Supreme Court should contain two scholar judges, but only one judge, Dr Ghazali, is part of the Bench on the quota of scholars. However, the Bench does not sit at all, and he has repeatedly complained about this to the respected Chief Justice, but his words have so far proven to be a voice in the wilderness. I myself brought this matter to the notice of Prime Minister Nawaz Sharif at least three times, but there was no effect.

I tried to draw the attention of Jamaat-e-Islami, Jamiat Ulama-e-Islam, Jamiat Ulama-e-Pakistan, and other religious groups to this matter several times, that they should make it a top-of-the-list demand from their side to complete the number of scholar members of these courts, as there is no method more effective than this in bringing Islamic laws to the country. While the Council of Islamic Ideology was a merely advisory council and had been unable to change any laws whatsoever since the rule of the late President Zia-ul-Haq, some of the religious groups did demand from the government to improve its management. As for the process for changing the laws through these two courts, perhaps it was due to the ill-effects of my own misdeeds that I could not convince anyone of their importance. Some of the individuals upon whom I tried to impress the importance of these courts said: “We were not aware of their importance until now. We will now focus on them”. These include Qazi Husain Ahmad and some other religious leaders, and they even expressed their willingness to immediately act in this direction. I remember that one time the leader of the Tanzeem-e-Islami, respected Dr Israr Ahmad (may Allah have mercy on him), with whom this lowly one had old acquaintance, once visited Darul Uloom. Prior to that visit, he had openly and quite sternly criticized my inclusion in the Supreme Court. I described the true work of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court

to him as well, and informed him that religious groups had not realized its true significance until now, due to which these courts could not be used as much as was possible. I also informed him of the work done through these courts despite this. He was not only convinced of their importance but even expressed his intention to form a committee immediately after returning home that would examine the laws and file petitions in these courts against those laws that were contrary to the Quran and Sunnah. However, he could not act on his intention afterwards, perhaps due to being busy with other activities. May Allah have infinite mercy on him.

Anyway! It is a tragedy for us that these courts have now been left virtually suspended due to our indifference, and now their composition is such that even if efforts are made to take work from them, it would not be easy for the efforts to bear fruit. As for those government officials who have the authority to correct their composition, why should they worry about this when neither the common people feel the need for it nor those religious groups who should feel this need the most. وإلي الله المشتكي